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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 72

BRADLEY REED SMITH,
Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff-Appellee.

ON CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN LIBRARY ASSOCIATION AS AMICUS CURIAE

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INDEX.

PAGE

Interest of Amicus Curiae 1

Summary of Argument 3

Argument 4

I. There Is No Constitutional Basis for Excluding from the Protections of Free Speech and Press Categorically Defined Obscenity, and the Definition Adopted by the California Statute Is Unconstitutional in Practice 4

A. The Three Postulates of *Roth* Do Not Support Its Conclusion 6

B. The Standard Adopted in *Roth* and by the California Statute Is Not Constitutionally Adequate 13

II. No Jury, Judge, or Court Should Be Given the Power to Condemn a Book and Imprison Its Author, Publisher, Seller and Exhibitor Merely on the Basis That the Book Is Offensive 18

Conclusion 28

TABLE OF AUTHORITIES CITED.

Cases.

Beard v. Alexandria, 341 U. S. 622 (1950) 12

Beauharnais v. Illinois, 343 U. S. 250 (1952) 11, 15

Branden v. United States, 365 U. S. 431 (1961) 25

Board of Education v. Barnette, 319 U. S. 624 (1943) .. 12

Burstyn v. Wilson, 343 U. S. 495 (1951) 14

Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) .. 6

Dennis v. United States, 341 U. S. 494 (1951) 12

E. F. Drew & Co. v. FTC, 235 F. 2d 735 (2d Cir. 1956) 12

Kingsley Books Inc. v. Brown, 354 U. S. 436 (1957) .. 16

Roth v. United States, 354 U. S. 476 (1957) .....
.....4, 5, 8, 12, 16, 17, 19, 24

Snyder v. Massachusetts, 291 U. S. 97 (1934) 7

State v. Truby, 29 So. 2d 758 (La. 1947) 20

United States v. L. Cohen Grocery Co., 255 U. S. 81 (1921) 20

United States v. L. Cohen Grocery Co., 264 Fed. 218 (E. D. Mo. 1920) 20

United States v. Roth, 237 F. 2d 796 (2d Cir. 1956), aff'd. 356 U. S. 476 (1957) 7, 8, 13, 16

Valentine v. Christensen, 316 U. S. 52 (1941) 12

Zeitlin v. Arnebergh, 32 U. S. L. Week 2044 (Calif. Sup. Ct. July 23, 1963) 5

Statutes.

California Penal Code § 311 5

California Penal Code § 311(e) 19

California Penal Code § 311.2 19

Miscellaneous.

Cardozo, The Nature of the Judicial Process (1921).. 7

5 Freedom To Read Bulletin, No. 1 (1962) 23

Haight, Banned Books, 25 (2d ed. 1955) 22, 23

1 Journals of the Continental Congress 108 (1774).... 9

Library Bill of Rights (1961) 26

Milton, Areopagitica in 4 The Writings of John Milton 395 (Pickering pub. 1851) 10, 17, 19, 23, 24, 25, 27

11 Newsletter on Intellectual Freedom No. 3 (1961).. 22

11 Newsletter on Intellectual Freedom No. 1 (1961).. 22

10 Newsletter on Intellectual Freedom No. 3 (1961).. 23

10 Newsletter on Intellectual Freedom No. 2 (1961).. 21

10 Newsletter on Intellectual Freedom No. 1 (1961).. 21

5 Newsletter on Intellectual Freedom No. 2 (1956).. 21

Petition for Writ of Certiorari, Appendix I, Smith v. California, 373 U. S. 901 (1963)..... 18

Smyth, A. H., Writings of Benjamin Franklin (1905).. 11

Starkie, Treatise on the Law of Slander (1826)..11, 16, 26

'To Deprave and Corrupt . . .' 53 (Chandos ed. 1962) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 812

BRADLEY REED SMITH,

Defendant-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Appellee.

ON CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES.

BRIEF OF AMERICAN LIBRARY ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE.

The American Library Association is the oldest and largest national library association in the world, with thirteen divisions, fifty-four state, regional and territorial chapters, and eight affiliated organizations. Founded in 1876, the Association has a membership today of more than 25,000 librarians, libraries, library trustees and friends of libraries.

In furtherance of its objective to extend and improve

library service and librarianship in the United States and throughout the world, the Association seeks to make books and ideas vital forces in American life, and to make libraries easily accessible to all people.

It has long been the position of the American Library Association to defend the right of the individual to read any book. The freedom to read is basic to our American way of life; censorship in any form infringes on this freedom. *Amicus* believes that the issues involved in this cause of action vitally affect and threaten this basic freedom. The matter is of particular concern to the Association and to its membership, since under the California statute involved, the Association and its membership could be held guilty of the crime with which the defendant is charged.

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT.

The defendant-appellant herein was found guilty by a jury in the Municipal Court of the Los Angeles District of violation of California Penal Code, § 311.2 by reason of his exhibiting and distributing the book, *Tropic of Cancer*, allegedly obscene. The statutory definition of obscenity, contained in Section 311, complies with the majority opinion in *Roth* v. *United States*, 354 U. S. 476 (1957).

It is our position in the first portion of this brief that the decision in *Roth* is neither sound in theory nor is the resultant California statute constitutional in practice. The reference to other categories of utterances rightly excluded from the protections of free speech and press, such as libel, is a false analogy and provides no authority for the decision in *Roth*. Moreover, we submit, a categorical definition for obscenity cannot constitutionally be made the basis of a statute prescribing criminal penalties for the sale or distribution of literature.

We further urge in the second portion of this brief that no jury, judge or court should be provided, as they are under the California statute and the doctrine announced in *Roth*, the legislative authority to condemn a book and imprison its author, publisher, seller and exhibitor. The evil toward which the California statute involved is directed can best be vanquished, without the attending injury and limitation to freedoms of speech and press, by reliance upon the choice of individuals to read or not to read, and upon the advocacy or criticism of professionals, groups and associations expressing interest and concern with literature. The power to persuade, in this context, is more compatible with our Constitution than is the power to imprison, and in the final analysis far more effective.

ARGUMENT.

I.

THERE IS NO CONSTITUTIONAL BASIS FOR EXCLUDING FROM THE PROTECTIONS OF FREE SPEECH AND PRESS CATEGORICALLY DEFINED OBSCENITY, AND THE DEFINITION ADOPTED BY THE CALIFORNIA STATUTE IS UNCONSTITUTIONAL IN PRACTICE.

The dispositive decision of this Court on the issues presented herein is to be found in *Roth* v. *United States*, 354 U. S. 476 (1957). The question there posed was whether "obscenity is utterance within the area of protected speech and press". From recognition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press," *id.* at 481, the majority reviewed the circumstances surrounding the phrasing of the First Amendment, made analogous reference to the then current limitations on libel, blasphemy and profanity, and concluded that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press." *Id.* at 484-85.

The majority in *Roth* seem to base their conclusion on three postulates:

1. Obscenity is outside the protection of the First and Fourteenth Amendments because it always has been.

> "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." *Id.* at 483.

2. Obscenity is utterly without redeeming social importance and is thus not within the protection of the First Amendment.

> "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained. . . ." *Id.* at 484-85.

3. Obscenity, like other classes of utterances such as libel, may be excluded from the protections of the First Amendment because it encroaches upon a limited area of more important interests.

> "All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." *Id.* at 484.

The California statute involved here artfully mirrors the standard for judging obscenity approved by this Court in Roth.[1] Its application to the defendant and to the *Tropic of Cancer* provides an excellent opportunity to examine the theory upon which this Court's pronouncement was based, and a typical example of its practice—in this case by the California legislature, by a California jury and by the California courts. *Amicus* respectfully urges that the theory upon which the *Roth* decision is based is not sound, and the facts presented by the instant cause of action dem-

1. California Penal Code, § 311 includes both the specific standard adopted in Roth, viz., "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," 354 U. S. at 489, and the Court's statement that "all ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . ." *Id.* at 484. The California Supreme Court in *Zeitlin* v. *Arnebergh*, 32 U. S. L. Week 2044 (July 23, 1963), has concluded that the California statute thus prohibits only hard-core pornography.

onstrate that the standard adopted is not constitutionally adequate.

A. The Three Postulates of Roth Do Not Support Its Conclusion.

1. *Obscenity is outside the protection of the First and Fourteenth Amendments because it always has been.*

As Justices Harlan and Douglas pointed out, 354 U. S. at 507, 509, this completely begs the question. The question remains: "What is obscenity?"

Some meaning might be found in the statement in *Roth* that "at the time of the adoption of the First Amendment . . . obscenity . . . was outside the protection intended for speech and press," if obscenity were, contrary to the statement in *Chaplinsky*,[2] a "well-defined and narrowly limited class of speech." Such, however, is not the case.

The difficulty with "obscenity" as a categorical—as with other concepts of totally subjective evaluation, such as "good", "bad", "beautiful" and the like—is that its meaning depends upon a host of historical, sociological and psychological factors interwoven under particular circumstances, in a particular place at a particular time.[3] Divorced from these factors, and from time, place and circumstance, it is an empty label which this Court, it is respectfully submitted, has for too long attempted to fill with some recognizable and constitutional content.

One might well determine which writings, speech or other

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2. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-72 (1942).

3. "We are—all of us—still in the blissfully ignorant position of the delegates to the old Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications, who discovered that they could not define obscenity, and then 'having triumphantly asserted that they did not know what they were talking about . . . settled down to their discussion.'" 'To Deprave and Corrupt . . .' 53 (Chandos ed. 1962).

communications were considered "obscene" at the time of the adoption of the First Amendment and thus outside its protection.[4] It could then be argued that they are, therefore, still properly excluded. However, there would seem little purpose in such effort, since this Court would not condone adoption of a standard existing 175 years ago, recognizing as it does that the Constitution is a living instrument.[5]

It must be shown, we submit, that the content of the word "obscene" as established by the Court in *Roth* is either subsumed within the definition of "obscene" as it existed at the time the First Amendment was adopted, or is sufficiently similar in purpose or principle. If such a showing is not made, no historical precedent to the *Roth* decision emerges from a finding that a category of utterances labeled obscene were excluded at the time of the adoption of the First Amendment. There is no magic in nor constitutional obstacle overcome by mere use of the word "obscene". Reference to a label to show precedent or authority, rather than to its meaning or content, is a dangerous course to set, for history records that the good name emblazoned upon a banner often hides the evil motivation of those who march beneath.[6]

It seems highly unlikely that today's definition of "ob-

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4. See, e. g., Judge Frank's scholarly analysis in the Appendix to his concurring opinion in *United States* v. *Roth*, 237 F. 2d 796, 806-09 (2nd Cir. 1956).

5. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921): "The great generalities of the constitution have a content and a significance that vary from age to age."

6. "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the road into existence." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934).

scene" is subsumed within that existing at the turn of the 18th Century, for certainly the catalogue of early writings compiled by Judge Frank concurring in the Court of Appeals decision in *Roth*[7] includes books whose dominant theme could be held to appeal to "prurient interests." Wherein lies the social importance of Benjamin Franklin's *Letter of Advice to Young Men on the Proper Choosing of a Mistress* or the *Speech of Polly Baker*?

If not subsumed within the concept of obscenity prevalent in the minds of the founding fathers, is today's definition of obscenity sufficiently similar in purpose or principle to that concept to permit reference to it as precedent?

It may well be that the purpose or principle underlying both the 18th Century objection to obscenity and that in *Roth* is the desire to preserve "social order and morality." If so, *amicus* submits that a showing should be demanded, not merely with the respect to *Tropic of Cancer*, but with respect to every application of a statutory categorical—be it "appeal to prurient interest" or satisfaction of voyeuristic or vicarious appetite—that social order and morality are advanced by such a limitation of the First Amendment. Absent such a showing, neither the condemnation of *Tropic of Cancer* nor the applied statute should be permitted to stand.

Justice Harlan partially concurring in *Roth* points out that the state legislature may make "a judgment that printed words can 'deprave or corrupt' the reader—that words can incite to anti-social or immoral action."[8] If this be true, some proof should be demanded that the words do have such effect. Absent such proof, reference to the preservation of the social interest in order and morality is without value. As both Justices Harlan and Douglas

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7. 237 F. 2d at 806-809.
8. 354 U. S. at 501.

pointed out, 354 U. S. at 500, 509, 512-3, governmental regulation must concern itself with anti-social acts, not thoughts.

Amicus respectfully submits that the postulate that obscenity has always been outside the First and Fourteenth Amendments does not support the conclusion in *Roth* and is of no real value in the decision of an obscenity case. The Court must still find a referent for "obscenity."

2. *Obscenity is utterly without redeeming social importance and is thus not within the protection of the First Amendment.*

To test this second postulate, it can of course be assumed that "obscene" writings under either the 18th Century definition or that adopted in *Roth* are without redeeming social importance. But if that be the measure by which the Court is to keep the First Amendment vital, of what good is it? Certainly, no one can be silenced merely because his words are without social importance. A casual glance at the evening hours of television more than proves this point.

It is respectfully submitted that there exists absolutely no authority for the contention that the protections of free speech and press adhere only to words of social value or importance. Even if the purpose of the First Amendment was to promote the advancement of truth, science, morality, and arts in general,[9] this purpose cannot be cited as authority for including within First Amendment protection only those words that have that effect. The

9. 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774), quoted in *Roth* at 484.

thought of Milton in *Areopagitica* could not be more to the point:[10]

> "Good and evil we know in the field of this World grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned, that those confused seeds which were imposed on Psyche as an incessant labour to cull out, and sort asunder, were not more intermixed. It was from out the rind of one apple tasted, that the knowledge of good and evil as two twins cleaving together leaped forth into the World. And perhaps this is that doom which Adam fell into of knowing good and evil, that is to say of knowing good by evil. As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear without the knowledge of evil? . . . Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger scout into the regions of sin and falsity than by reading all manner of tractates, and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read."

The postulate of "social importance," on scrutiny, must surely fail.

If the Court's second postulate gives us no aid, can the theory in *Roth* be yet sustained by reference to the third?

3. *Obscenity, as with other classes of utterances such as libel, may be excluded from the protections of the First Amendment because it encroaches upon a limited area of more important interests.*

We submit that this postulate too must fall, for the analogy to libel or other properly proscribed utterances is false.

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10. Milton, *Aereopagitica* in 4 THE WORKS OF JOHN MILTON 395, 411-12 (Pickering pub. 1851).

What is the unifying fabric of utterances properly placed outside the protection of freedom of speech?

Certainly the capability to cause injury or harm to another or to society is the essential factor. As Benjamin Franklin noted (A. H. Smyth, Writings of Benjamin Franklin, pp. 29-31 (1905)):

> "Without freedom of thought there can be no such thing as wisdom; it is the right of every man as far as by it he does not hurt or control the right of another; and this is the only check it ought to suffer, and the only bond it ought to know. . . .Who ever would overthrow the liberty of a nation must begin by subduing the freeness of speech: a thing terrible to public traitors."

In the first American edition of *Treatise on the Law of Slander* by Thomas Starkie (1826), the author observed that "some limit should be prescribed to communications affecting the reputation of individuals." For "the happiness and prosperity of the individual [may be] impaired by imputations disgracing him as a man, and depriving him of the comforts of society; or affecting his credit and abilities in any particular character, and excluding him from the enjoyments of the honours and emoluments instanter to his satisfaction in life." The author concluded that "since experience proves, that such may be the fatal consequences of malice thus exerted, the means by which they are effected are properly the object of legal coercion and restraint." Pp. xxiii-xxiv.

As injury to reputation could be considered the gravamen of the offense in civil libel,[11] the traditional justification for punishing criminal libels was the "insulting or fighting words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace."[12]

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11. See STARKIE, TREATISE ON THE LAW OF SLANDER 17 (1826) and early English cases there cited.

12. *Beauharnais* v. *Illinois*, 343 U. S. 250, 256 (1952).

Another related class of utterances is that which creates a "clear and present danger of a substantive evil which the legislature has a right to prevent," and such danger which the legislature has a right to prevent is the "[o]verthrow of the government by force and violence, [which] is certainly a substantial enough interest for the government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[13]

It can be seen that in both these exceptions, and others that could be mentioned,[14] it is not the words themselves which give rise to their exclusion, but the results they bring about. It is the concern with results rather than words that forms the basis for placing these utterances outside the constitutional protection of free speech and press.

Nowhere in the majority's definition is there any reference to the "effects" of obscenity, or its tendency to encroach upon or be destructive of interests of the individual or State sufficiently substantial to warrant restriction of speech.[15] A perusal of cases concerning obscenity reveals that rarely is it shown or even offered to be shown that

13. *Dennis* v. *United States*, 341 U. S. 494, 509 (1951).

14. See, *e. g.*, *Valentine* v. *Christensen*, 316 U. S. 52, 54-55 (1941) (ordinance prohibiting distribution of advertising bills on city streets does not abridge freedom of press and speech); *Beard* v. *Alexandria*, 341 U. S. 622, 644-45 (1950) (ordinance prohibiting house-to-house solicitation with prior consent not an abridgment of First Amendment principles); *E. F. Drew & Co.* v. *FTC*, 235 F. 2d 735, 740 (2nd Cir. 1956) (no constitutional right to disseminate false or misleading advertisements).

15. Why is "obscenity" an exception to the rule announced in *Board of Education* v. *Barnette*, 319 U. S. 624, 633 (1943)? "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." It is respectfully submitted that the answer in *Roth* that it is because it is, 354 U. S. at 486, is insufficient.

obscene utterances have any measurable effect upon those to whom they are communicated, or that any injury or other damage results.[16] An analysis of these cases indicates that it is the words themselves rather than their effect that have erroneously led courts to exclude them from the protections of free speech and press. Such obscenity cases can not be equated with those involving false words causing damage. It is respectfully submitted that obscenity can only share a common fabric with other properly excluded classes of utterances when damage to the individual or to the State is demonstrable. As Justice Douglas pointed out 354 U. S. at 513, the majority definition, "does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit."

Absent such a nexus, the parallel reference to other properly excluded classes of utterances, such as libel, is unsound, and *Roth's* third postulate, we submit, is invalid.

B. The Standard Adopted in Roth is Not Constitutionally Adequate.

Even if, in the absence of supporting data, we were to agree with Justice Harlan that "the State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex will have an eroding effect on moral standards,"[17] it is still possible to describe with precision those utterances or other forms of speech legitimately within the police power of the states to proscribe. The writings and photographs sold surreptitiously on playgrounds or associated with "stags" are certainly subject to description. Other examples can be thought of. However, the statute that has emerged from this Court's

16. *United States* v. *Roth*, 237 F. 2d 796, 811.

17. 354 U. S. at 502.

definition in *Roth* is, we submit, completely lacking in precision, and thus not only fails to achieve its goal but is constitutionally inadequate.

This consititutional inadequacy is well demonstrated by review of this Court's decision in *Burstyn* v. *Wilson*, 343 U. S. 495 (1951) where it was held that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious". Though the decision may well be interpreted as a ruling that, regardless of how exactly defined, sacrilege is not a class of utterances outside the protection of freedom of speech and press, nevertheless, the Court seemed to base its reasoning on the finding that "in seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies." The Court concluded that "New York cannot vest such unlimited restraining control over motion pictures in a censor." 343 U. S. at 505.

The learned concurring opinion of Justice Frankfurter in *Burstyn* is much in point, for after an intriguing and scholarly analysis of the meaning of the term "sacrilegious", he observed the imprecision of the word, and the danger involved in permitting its use in a proscriptive statute.

> "To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious'. And if we cannot tell,

> how are those to be governed by the statute to tell?" 343 U. S. at 531.

Justice Frankfurter concluded that the term "sacrilegious" was patently in disregard of the constitutional requirements of definiteness, because it necessarily involved "subjective determination":

> "From all that has been said one is compelled to conclude that the term 'sacrilegious' has come down the stream of time encrusted with a specialized, strictly confined meaning, pertaining to things in space not things in the mind. The New York Court of Appeals did not give the term this calculable content. It applied it to things in the mind, and things in the mind so undefined, so at large, as to be . . . patently in disregard of the requirement for definiteness, as the basis of proscriptions and legal sanctions for their disobedience. . . ." 343 U. S. at 533.

The list of books banned, burned and exhorted against since man first learned to write evidences not only the ludicrous condemnation of some and the dangerous suppression of others, but also clearly indicates the varying and uncertain definitions of "obscene". The conclusion of Justice Harlan in *Roth* v. *United States* that constitutional standards of obscenity do not readily lend themselves to generalized definitions is, it is respectfully urged, a grave understatement. Obscenity is of no more easy definition than sacrilege, and when such definition, as in the one at bar, pertains to "things in the mind, and things in the mind so undefined," it suffers the same disability as that discovered by Justice Frankfurter in *Burstyn*.

This Court in *Roth* has created a definition, which California has adopted, that, we respectfully suggest, falls woefully short of the mark in terms of both precision and constitutional adequacy. In the last analysis, it vests in a jury the power to determine the nature of the "average person", the nature of "contemporary community stand-

ards" and what is more difficult and thus more dangerous, the power to determine what utterances are "utterly without redeeming social importance". Clearly, this is to set the jury adrift "upon a boundless sea amid a myriad of conflicting currents" and places upon them the power to censor. Obviously such a standard might have been applied to "sacrilegious", with just as unsatisfactory a result.

It is too easy a solution to say that "a jury trial . . . provides a peculiarly competent application of the standard for judging obscenity,"[18] or that "the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves."[19] As Judge Frank has well stated, "How does the judge [or judges, or justices] determine whether a book is obscene? Not by way of some sort of judicial notice, Whence come the judicial notice data to inform him?"[20]

As Starkie observed:

> "The advantage to the community would be infinite, could any organ of communication be discovered, which would faithfully transmit to the public every sentence capable of improving and delighting, but repress every gross and pernicious sentiment. The difficulty consists in discovering such a literary alembic. In whom are united the talents requisite for the task? Does the possessor of them superadd an integrity and impartiality liable to no influence, prejudice, or bias? Who is competent to judge of such high qualifications? Where shall the power of appointment reside?" Pp. xxiv-xxv.

If, as this Court recognized in *Roth*, "there may be marginal cases in which it is difficult to determine the side of

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18. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 448 (1957) (dissenting opinion).

19. 354 U. S. at 497 (concurring opinion).

20. *United States* v. *Roth*, 237 F. 2d 796, 822.

the line on which a particular fact situation falls,"[21] on what basis will this Court select those marginal cases which it will decide, which cases it will permit lower courts to decide? Are any of these forums, in the last analysis, justifiably empowered to determine what can and what cannot be read? Who is to be the arbiter, final or otherwise, carrying with him the sanction of law and the power to imprison, as to what is "utterly without redeeming social importance?" To excuse an attempted resolution of this problem by claiming that "no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States,"[22] or in one of our courts, or in one of our generations, seems impermissible in light of the wording of the First Amendment and the absence of evidence that there is "encroachment on more important interests."

For every book of value that finds its way to this Court and is thus saved for posterity there may well be a thousand others not so fortunate, but just as deserving. We submit that the danger involved to the freedom of press and speech and to literary heritage greatly outweighs the evil toward which statutes such as the one at issue are directed. "Who kills a Man kills a reasonable creature, Gods Image; but he who destroys a good book, kills reason itself, kills the Image of God . . . revolutions of ages do not oft recover the loss of a rejected truth."[23]

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21. 354 U. S. at 491, quoting *United States* v. *Petrillo*, 332 U. S. 1, 7 (1947).

22. 354 U. S. at 506 (concurring opinion of Justice Harlan).

23. Milton, *supra* at 400.

II.

NO JURY, JUDGE OR COURT SHOULD BE GIVEN THE POWER TO CONDEMN A BOOK AND IMPRISON ITS AUTHOR, PUBLISHER, SELLER AND EXHIBITOR MERELY ON THE BASIS THAT THE BOOK IS OFFENSIVE.

In the last analysis, the definition in *Roth* gives to some who find themselves offended by what they read the power to imprison. Granted not all so offended will find themselves within a jury box or behind the judicial bench, but such power placed in those who do presents a real and frightening danger. Are there not more appropriate safeguards against offensive literature? It is respectfully submitted that they abound and are compatible with and promotive of the values and goals of our Constitution and system of government.

Though the literary merit of Henry Miller's *Tropic of Cancer* has been attested to by many scholars and critics,[24] it is not the purpose of this *amicus* to take sides in evaluating the book in terms of literature. However, we unequivocally believe in the right of the individual to read or reject any book. In the exercise of self-determination in this respect, the individual rejects many books because they are dull, because they fail to speak to him in terms of his own experience, background, or interest, or because they offend his sensibilities. Let him who is offended put down the book he finds offensive and let him warn others of what he has found. In a great sense, this function is not solely that of the professional critic, or librarian, or any one who pretends experience and knowledge in evaluating literature, but, rather, it is the function of any one who can read, and on the basis of that reading, voice opinions.

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24. See, e. g. Appendix I of defendant's Petition for Writ of Certiorari filed herein.

> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter. Her confuting is the best and surest suppressing."[24a]

With all due respect to Mr. Chief Justice Warren's view in *Roth*, 354 U. S. at 495, the dubious protection of the requirement of *scienter*,[25] does not always place the individual, rather than the book on trial.[26] The California legislature, following to the letter the definition of obscenity urged by this Court in *Roth*, has empowered a jury or judge to decide, according to their own conscience, whether a particular book shall be read.

The standard adopted in *Roth* and contained in the California statute is so vague and so subject to arbitrary application as to constitute an unconstitutional delegation of legislative power. Surely a state legislature cannot permit a jury to decide for themselves what items can or cannot be sold in commerce. Exercising its police power, the legislature can proscribe the sale or use of narcotics, alcoholic beverages, gambling devices and the like. What item or items are to be proscribed is a decision to be vested in the legislature, and having so described them, a jury determines whether they were in fact used or sold. The legislature does not permit the jury to decide which items

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24a. Milton, *supra* at 443.

25. Section 311(e) of the California Penal Code requires that for conviction a defendant must have had knowledge that the matter is obscene.

26. Section 311.2 of the California Penal Code applies to anyone who prepares, publishes, prints, exhibits or distributes obscene matter. Obviously, a determination in a relevant jurisdiction that a particular book was obscene would be a virtual embargo on that book in that jurisdiction, and injunctive action against a publisher or printer would result in an absolute embargo.

subject to use or sale are to be banned. Because the definition of obscenity, as set forth by this Court in *Roth* and resultantly by the California legislature, is so meaningless, it in effect gives juries the power to define the subject matter of the crime. It is submitted that there is no authority for the delegation of this power, even if freedom of speech were not at issue.

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921) is exactly in point on this question. In the opinion below, 264 Fed. 218 (E. D. Mo. 1920), the Court held as unconstitutionally vague a criminal statute making it "unlawful for any person . . . wilfully to make any unjust or unreasonable charge in handling or dealing in . . . necessaries."

> " 'Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country.' . . . .
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> "If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or a wrongful, or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal." 264 Fed. at 220-223.

The Supreme Court, in affirming, recognized this unconstitutional delegation of authority:

> "[W]e see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U. S. at 89.[27]

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27. See, also, *State* v. *Truby*, 29 So. 2d 758 (La. 1947) (statutory use of word "immoral" held unconstitutional delegation of authority to Courts) and cases cited therein.

No matter how hallowed the institution of a jury, to permit twelve "average persons applying contemporary standards" to decide what is "utterly without redeeming social importance" and thus to determine the literary fate of any manuscript is to entrust them with frightening authority and we submit should be unthinkable. That such a determination is subject to judicial review affords little comfort, for the judicial robe, with all due respect, does not carry with it a guaranty of wisdom.

Obviously a contemporary jury might well have found that "to the average person, applying contemporary standards, the predominant appeal, taken as a whole", of Ovid, St. Augustine, Shakespeare, Voltaire, Rabelais, Mark Twain or Aldous Huxley "was to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which [went] substantially beyond customary limits of candor in description or representation of such matters and [was] matter . . . utterly without redeeming social importance."

We may agree or disagree with Mrs. Ann Smart that Steinbeck's *A Russian Journal* or Pearl Buck and Eslanda Robeson's *American Argument* are obscene.[28] We may be in accord or not with complaints of the good people of Fall River and Lowell, Massachusetts that an issue of *Life* magazine containing 14 photographs of famous statues and paintings of nude or partly nude women was obscene.[29] We may smile or not at the woman exclaiming, upon reading an account of Plato's proposals in *Living Biographies of Great Philosophers* by Henry and Dana Lee Thomas, that she could not help but believe that the book was "one reason why we have so many sex maniacs walking about."[30]

28. See 10 NEWSLETTER ON INTELLECTUAL FREEDOM (published by the American Library Association) No. 1, p. 5 (1961).

29. See 5 *id.* No. 2, p. 1 (1956).

30. See 10 *id.* No. 2, p. 3 (1961).

The dissatisfied parents who approached the North Little Rock School Board complaining that *Exodus* by Leon Uris should not be made available because "certain passages were filthy reading", are welcome to their opinions.[31] Equally so is the group of parents who saw danger to the morals of the nation presented by *The Scarlet Letter*, *The Good Earth* and *Drums Along the Mohawk*.[32]

There are those who claim bad taste and immorality present in the book, *A History of the United States from the Age of Exploration to 1865* by Hugh T. Leffler, in its four page description of the old Puritan custom of bundling,[33] and they are free to refuse to let their children read it. Whether Anne Frank's *Diary* is "filthy" for adults to read,[34] or Edgar Rice Burrough's *Tarzan*, and Zane Grey's works should be condemned because the Ape Man and Jane were ostensibly living together without benefit of a church wedding[35] and Zane Grey used corrupting language such as "hell" and "damn"[36], might be suitable topics for debate. Certainly Dr. Leslie Weatherhead, former president of the Methodist Conference of England may wax eloquent in favor of censoring the Bible to excise from it "a lot of bloody massacres and a lot of smutty passages that choir boys read on the quiet."[37]

There might be point in discussing whether Samuel Coleridge was correct in his contention that "Shakespeare's words are too indecent to be translated . . . His gentlefolk's talk is full of coarse allusions such as nowadays you could hear only in the meanest taverns."[38]

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31. See 11 *id.* No. 3, p. 5 (1961).
32. See 11 *id.* No. 1, p. 3 (1962).
33. See *id.* p. 5.
34. See *id.* p. 7.
35. See *ibid.*
36. See *ibid.*
37. See 11 *id.* No. 3, p. 27 (1962).
38. See HAIGHT, BANNED BOOKS 25 (2 ed. 1955).

We may, in turn, voice our criticism of the Brooklyn Public Library in 1876 for excluding from the children's room the *Adventures of Tom Sawyer*.[39] We may find paradox in the fact that in 1930 *An American Tragedy* was required reading for a Harvard English course, when across the river the Supreme Court of Boston fined its publisher $300.00.[40] We may praise the United States Attorney, David C. Acheson, for his criticism of the vagueness of proposed legislation making criminal the dissemination of "intrigues between men and women" in noting that Romeo and Juliet might, therefore, be banned.[41]

Such is the nature of the market place of ideas. The diversity of taste and of opinion, particularly in the area of speech and writing, remains a stimulus to thoughtful, creative expression. The danger arises only when one taste or one opinion carries with it the sanction of law and the power to ban. The danger is obvious with a jury of Ann Smarts, Plato critics, Dr. Weatherheads, Coleridges and Fall River citizens. What would be the fate of *Gargantua* or *Candide* or *The Decameron* had there been such a panel? It is submitted that our libraries and our heritage might be reduced to "The Rabbit's Wedding" and it is conceivable that some jury could bring in a finding of guilty on that "work."[42] As Milton asked, "Why should we then affect a rigour contrary to the manner of God and of nature, by abridging or scanting those means, which books freely permitted are, both to the trial of virtue and the exercise of truth?"[43]

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39. See *id.* at 66.

40. See *id.* at 81.

41. See 10 NEWSLETTER No. 3, p. 6 (1961).

42. A children's book, THE RABBIT'S WEDDING by [Garth Williams] was objected to in Texas because one rabbit was white and the other black. See 5 FREEDOM-TO-READ BULLETIN, No. 1, p. 10 (1962), published by the American Book Publisher's Council, Inc.

43. Milton, *supra* at 419.

The individual views of our hypothetical jurymen, regardless of how atypical or lacking in wisdom, are entitled to be heard. It is a different matter altogether to grant such individuals the right to condemn and imprison by giving them the right to decide what is obscene, what is prurient and what is socially unimportant.

Again as Milton observed

> "If every action which is good, or evil in man at ripe years, were to be under pittance, and prescription, and compulsion, what were virtue but a name, what praise could be then due to well-doing, what gramercy to be sober, just or continent? many there be that complain of divine Providence for suffering Adam to transgress, foolish tongues! when God gave him reason, he gave him freedom to choose, for reason is but choosing; he has been else a mere artificial Adam, such an Adam as he is in the motions."[44]

No solace may be found in the contention that "one of the consequences we accept under our jury system [is that] different juries may reach different results under any criminal statute."[45] By no statute should the jury or the Court be entitled to define the subject matter of the crime.

Criticism and resistance to superimposed conformity is not a new vocation or recently discovered need:

> "How many other things might be tolerated in peace, and left to conscience, had we but charity, and were it not the chief stronghold of our hypocrisy to be ever judging one another. I fear yet this iron yoke of outward conformity hath left a slavish print upon our necks; the ghost of a linen decency yet haunts us. We stumble and are impatient at the least dividing of one visible congregation from another, though it be not in fundamentals; and through our forwardness to suppress, and our backwardness to recover any enthralled

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44. *Id.* at 418.

45. *Roth, supra*, 354 U. S. at 492, fn. 30.

> piece of truth out of the gripe of custom, we care not to keep truth separated from truth, which is the fiercest rent and disunion of all."[46]

The problem of how ideas should be expressed, what books should be published and sold, what books should be purchased and read is not one of easy answer. One need go no further than the decisions of this Court pertaining to books to realize the complexity of the problem.

Amicus submits, however, that the solution lies not in the courts, but in the marketplace of ideas. There are a myriad of groups seeking to influence the attitudes, opinions and behaviors of others. The world of literature, in company with other worlds of expression, lives in an environment of pressure groups that have arisen because they satisfy some social need. They perform useful as well as objectionable functions. But the very basis for the right of association and freedom to express opinion is the conviction that such freedom to advocate ideas, such competition to have public support and approval, is best calculated to insure an enlightened public opinion and wise public policy.[47]

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46. Milton, *supra* at 444-5.

47. "The area set off for individual freedom by the Bill of Rights was marked by boundaries precisely defined. It is my belief that the area so set off provides an adequate minimum protection for the freedoms indispensable to individual liberty. Thus we have only to observe faithfully the boundaries already marked for us.

". . . As I understand it, this Court's duty to guard constitutional liberties is to guard those liberties the Constitution defined, not those that may be defined from case to case on the basis of this Court's judgment as to the relative importance of individual liberty and governmental power. The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation . . . . The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now."

Branden v. *United States*, 365 U. S. 431, 438, 444-45 (1961) (dissenting opinion of Black, J.).

Along side these pressure groups, or more accurately in front of them, stand authors, publishers, book sellers, libraries and ultimately the reading public. In a democratic society, these groups gathering whatever support they may from professional scholars and critics are, in the last analysis, the most satisfactory means of persuading the author, publisher, seller, library and reading public of what should or should not be written or read.

As *Starkie* has pointed out, "the advantage to the community would be infinite, could any organ of communication be discovered which would faithfully transmit to the public every sentence capable of improving and delighting, but repress every gross and pernicious sentiment."[48] Of the many voices to be heard, which are to be listened to?

Though *amicus* does not hold itself out as a paragon of wisdom in adopting a policy of what is to be read, what is to be skimmed and what is to be discarded, the following basic policies are advocated for its members:

1. As a responsibility of library service, books and other reading matter selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should any book be excluded because of the race or nationality or the political or religious views of the writer.

2. There should be the fullest practicable provision of material presenting all points of view concerning the problems and issues of our times, international, national, and local; and books or other reading matter of sound factual authority should not be proscribed or removed from library shelves because of partisan or doctrinal disapproval.

3. Censorship of books, urged or practiced by volunteer arbiters of morals or political opinion or by organizations that would establish a coercive concept of Americanism, must be challenged by libraries in main-

48. STARKIE, *supra* at xxiv.

tenance of their responsibility to provide public information and enlightenment through the printed word.[49]

Other equally responsible organizations are concerned with the value and protection of our literary heritage. It is respectfully submitted that the arena in which these groups and the persuasive pressures to which they are subject interact is the only proper forum for a determination of what should or should not be read. It is faith in the democratic process and its institutions that creates "confidence in the ability of our people to reject noxious literature [and] their capacity to sort out the true from the false in theology, economics, politics or any other field."[50]

Is this not then, rather than the jury or the judge, the best literary alembic?

> "And again, if it be true, that a wise man like a good refiner can gather gold out of the drossiest volume, and that a fool will be a fool with the best book, yea or without book, there is no reason that we should deprive a wise man of any advantage to his wisdom, while we seek to restrain from a fool, that which being restrained will be no hindrance to his folly.
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> . . . .
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> "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin; for, besides that it is a huge heap increasing under the very act of diminishing, though some part of it may for a time be withdrawn from some persons, it cannot from all, in such a universal thing as books are; and when this is done, yet the sin remains entire. Though ye take from a covetous man all his treasure, he has yet one jewel left, ye cannot bereave him of his covetousness. Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make him chaste, that came

49. Library Bill of Rights, adopted and amended by the American Library Association Council, Feb. 1, 1961.

50. *Roth, supra*, 354 U. S. at 514 (dissenting opinion of Douglas, J.).

not thither so; such great care and wisdom is required to the right managing of this point.

. . . .

"Impunity and remissness, for certain are the bane of a Commonwealth, but here the great art lies to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work."[51]

CONCLUSION.

To call a book obscene is to apply a label that has no semantic referent. To conclude that a book has no social importance answers no First Amendment problem. In such areas, the persuasion of public opinion should be the only acceptable censor. Only where a book or writing is shown to damage society or one of its members wrongfully—be it libelous, seditious, or "obscene"—should freedom of the press give way to more important social interests and Government have the power to restrain and punish. No such test having been applied by the court below, or required by Section 311 of the California Penal Code, the judgment of the court below should be reversed.

Respectfully submitted,

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51. Milton, *supra* at 414-419.